Office-Supreme Court, U.S.
FILED
SEP 20 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-100

IN THE

# Supreme Court of the United States

**October Term, 1984**

BERNAT KUPFERSTEIN,

*Petitioner,*

*—against—*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

## RESPONDENT'S BRIEF IN OPPOSITION

ELIZABETH HOLTZMAN
*District Attorney, Kings County*
210 Joralemon Street
Brooklyn, New York 11201

BARBARA D. UNDERWOOD *
STUART D. RUBIN
*Assistant District Attorneys*
*of Counsel*
(718) 834-5022

* Counsel of Record

BEST AVAILABLE COPY

## Questions Presented

1. Whether defendant's failure to alert the state court to the federal nature of his claims precludes certiorari review by this Court.

2. Whether the state trial court properly denied defendant's motion to withdraw his guilty plea where based upon the record of a full evidentiary hearing it found, that with advice of competent counsel, defendant had waived his constitutional rights, admitted his guilt, and pled guilty with full knowledge of the consequences.

## TABLE OF CONTENTS

PAGE

Questions Presented ..... i

Table of Authorities ..... ii-iii

Respondent's Brief in Opposition ..... 1

Opinions Below ..... 1

Jurisdiction ..... 2

Statement of the Case ..... 2

ARGUMENT:

Reasons For Denying The Writ ..... 9

1. Defendant Never Properly Presented His Federal Claims to the State Court ..... 9

2. Neither Defendant's Claim of Innocence Nor His Challenge to the Voluntariness of His Guilty Plea Raises A Substantial Federal Question ..... 11

CONCLUSION:

For the Foregoing Reasons, The Petition For A Writ of Certiorari Should Be Denied ..... 13

### TABLE OF AUTHORITIES

*Beck v. Washington*, 369 U.S. 541 (1962) ..... 9, 10

*Blackledge v. Allison*, 431 U.S. 63 (1977) ..... 11, 12

*Boykin v. Alabama*, 395 U.S. 238 (1969) ..... 11, 12

*Brady v. United States*, 367 U.S. 742 (1970) ..... 11

*Daye v. Attorney General*, 696 F.2d 186 (2d Cir. 1982) ..... 10

PAGE

*Ellis v. Dixon*, 439 U.S. 458 (1955) ..... 9

*Hunter v. Fogg*, 470 F. Supp. 1041 (S.D.N.Y. 1979) 8

*Machibroda v. United States*, 368 U.S. 487 (1962) .. 11

*North Carolina v. Alford*, 400 U.S. 25 (1970) .. 8, 11, 12

*People v. Brown*, 45 N.Y.2d 852 (1978) ..... 9

*People v. Miller*, 42 N.Y.2d 946 (1971) ..... 11

*Santobello v. New York*, 404 U.S. 257 (1971) .... 11, 12

*Strickland v. Washington*, — U.S. — (1983) ..... 10

*United States ex rel. Dunn v. Casscles*, 494 F.2d 397 (2d Cir. 1974) ..... 12

*United States v. Barker*, 514 F.2d 208 (1975) ..... 12

*United States v. Johnston*, 268 U.S. 220 (1925) .... 12

*Webb* v. *Webb*, 451 U.S. 493 (1981) ..... 9

*Whitney v. California*, 274 U.S. 357 (1928) ..... 9

*Statutes:*

New York Criminal Procedure Law § 440.10 ..... 9

28 U.S.C. § 1257 ..... 2, 9

United States Constitution

Amendment V ..... 8

Amendment VI ..... 8, 9

No. 84-100

IN THE

# Supreme Court of the United States

October Term, 1984

BERNAT KUPFERSTEIN,

*Petitioner,*

*—against—*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION

The respondent, the State of New York, asks this Court to deny the petition for a writ of certiorari, seeking review of the judgment of the Appellate Division of the New York State Supreme Court, Second Department, in this case. That judgment was not accompanied by an opinion. It is reported at 100 A.D.2d 983, 473 N.Y.S.2d 898 (2nd Dept. 1984).

## Opinions Below

The judgment of conviction was affirmed without opinion in the court below. *People v. Kupferstein*, 100 A.D.2d 983, 473 N.Y.S.2d 898 (2nd Dept. 1984). Leave to appeal was denied by an Associate Judge of the New York Court of Appeals on June 1, 1984. (Wachtler, J.). —— N.Y.2d —— (1984).

## Jurisdiction

The judgment of the Appellate Division of the New York State Supreme Court, Second Department was entered on April 9, 1984, affirming defendant's judgment of conviction, dated September 24, 1982. Leave to appeal to the Court of Appeals was denied on June 1, 1984. The petition for certiorari was filed within 60 days of that date. Jurisdiction is invoked under 28 U.S.C. § 1257.[1]

## Statement of the Case

### Introduction

Defendant Bernat Kupferstein was convicted, after a plea of guilty, of Falsifying Business Records in the First Degree [New York Penal Law § 170.10]. The plea was entered in New York State Supreme Court, Kings County, in satisfaction of a 124 count indictment charging defendant with grand larceny, forgery, falsifying business records, and violations of the New York General Business Law. These charges arose out of numerous illegal real estate transactions occurring over a 15-year period and involving millions of dollars.

Defendant was sentenced on October 25, 1982 to five years probation, $200,000 restitution, and $2,400 to be paid to the District Attorney's office for trial expenses. The conviction was affirmed by the Appellate Division, Second Department, 100 A.D.2d 983, 473 N.Y.S.2d 898 (2d Dept. 1984), and leave to appeal to the Court of Appeals was denied, —— N.Y.2d ——, —— N.Y.S.2d —— (1984).

---

[1] Defendant also incorrectly invokes jurisdiction under U.S.C. § 1254, which applies to review of a decision of a federal court of appeals.

Defendant is currently on probation and has paid $70,000 of his court ordered restitution to an escrow account.

## The Plea

On April 28, 1981, defendant waived a jury and proceeded to trial, along with his co-defendant, Ferdinand Landau. After two weeks of testimony, involving hundreds of exhibits, defendant and Landau indicated that they wished to plead guilty.[2]

On May 12, 1981, on the advice of counsel, defendant entered a plea of guilty to one count of Falsifying Business Records in the First Degree in full satisfaction of the indictment (A. 95-96).[3] Defendant stated that he had ample opportunity to discuss the case with his attorney, and that he was pleading guilty because he was in fact guilty (A. 96).

The court explained that by pleading guilty defendant was confessing his guilt and waiving his right to continue the trial (A. 97). The court advised defendant that he was not obligated to incriminate himself, and that he had the right to continue the trial, to cross-examine witnesses and to controvert the evidence against him (A. 97-98). Defendant confirmed that he understood these rights and that his attorney had discussed them with him (A. 98). Defendant acknowledged that he was entering the plea voluntarily, that he had not been promised anything in

---

[2] Landau was also convicted, on a plea of guilty, of Falsifying Business Records in the First Degree [New York Penal Law § 170.10]. He never sought to withdraw his plea and never appealed his conviction.

[3] Numbers in parentheses preceded by the letter "A" refer to page numbers of Defendant's Appendix used in the court below. Numbers in parentheses preceded by the letter "B" refer to page numbers of Respondent's Appendix used in the court below.

return for his plea, and that he was not currently under the care of a physician or taking any medication (A. 96-98).

Defendant admitted that during the period of February 5, 1963, through April 1976 he participated in a real estate arrangement whereby he agreed to be a contributing partner of Parkview of Hempstead Associates (A. 99-100). Towards that end, he signed an instrument stating that he had contributed $10,000 to the enterprise when, in fact, he had not contributed any money (A. 100-109). His intent in making the false entry was to make money for himself at the expense of the other partners (A. 101). Over the years, the other partners apparently relied on defendant's false contribution statement and defendant received profits from the real estate transactions (A. 107-11).

The court indicated that it would probably impose a sentence of five years probation (A. 119-20), and as a condition of probation it would require restitution in the amount of $200,000 to the victims plus $2,400 to be paid to the Office of the District Attorney (A. 119, 139). The court would require the defendant to pay $80,000 on or before the sentence date (A. 116), and the balance within four or five years, on a payment schedule to be determined at the time of sentence (A. 119). If the court decided it could not keep its promise, then it would allow defendant to withdraw his plea (A. 115).

Defendant acknowledged that he understood the conditions of the plea, and that he took the plea in order to dispose of the case once and for all (A. 116-21).

## Motion and Hearing to Withdraw the Plea

In an affidavit dated June 24, 1981, defendant moved to withdraw his plea. He claimed that he was innocent of all crimes, but had pled guilty because his attorney had

coerced him (A. 89-91). The court ordered a hearing to determine defendant's claim.

### The Evidence in Support of the Motion

Defendant testified that he had retained Mr. Murray Cutler to represent him in this case in 1978 (Kupferstein: A. 248). Prior to trial defendant wrote to Mr. Cutler about his case, but received no letters in response (Kupferstein: A. 250-53). He did speak with Mr. Cutler about the case before trial (Kupferstein: A. 254). After the trial began, Mr. Cutler asked defendant if he wanted to plead guilty, but defendant said no (Kupferstein: A. 256). When Landau decided to plead guilty, Mr. Cutler put pressure on defendant to do so (Kupferstein: A. 257). Defendant felt he had no choice but to plead guilty (Kupferstein: A. 257).

At this point defendant consulted two other attorneys, ROBERT BARON and IRVING HEISLER, who advised him not to change attorneys in the middle of trial (Kupferstein, Baron, Heisler). Defendant felt that if he did not plea guilty, Mr. Cutler would not properly defend him (Kupferstein: A. 259). In addition, Mr. Cutler frightened defendant into thinking that he might go to jail if he did not take the plea (Kupferstein: A. 259-260). He decided to take the plea and to appeal later (Kupferstein: A. 259).

Defendant claimed that he was innocent because he only carried out the ministerial functions that Landau had ordered him to perform (A. 245). Defendant admitted that the Parkview Associates partnership agreement accurately represented his false statement that he had contributed $10,000 of capital towards the purchase price of the property (B. 29-30).[4]

---

[4] Defendant claimed that by a separate agreement, Landau had owed him $10,000 as a finder's fee and for management of the property. Landau then converted this debt to shares in the partnership (B. 30-33).

## The Evidence in Opposition to the Motion

Attorney Murray Cutler represented defendant during the three-year course of the case (Cutler: 366). He made numerous court appearances, filed motions, and communicated with defendant on many occasions (Cutler: A. 366-67).

At the beginning of the case, Mr. Cutler told defendant that the prosecutor had offered a plea. If defendant admitted his guilt, he would have to go to jail for ninety days and would have to pay $1,000,000 restitution (Cutler: A. 368). Defendants did not want to plead guilty because be believed that he was not culpable (Cutler: A. 368). Defendant claimed that Landau had masterminded the scheme and that he had just followed orders (Cutler: A. 383). Mr. Cutler explained to defendant that he was culpable even though his role in the fraud had been less important that Landau's role (Cutler: A. 383). Mr. Cutler also made defendant aware of the consequences of going to trial on a one hundred and twenty-four count indictment. (Cutler: A. 369).

After two weeks of the trial, Landau decided to plead guilty (Cutler: A. 370). Mr. Cutler and defendant discussed all of defendant's options and the consequences of entering a guilty plea. Mr. Cutler advised defendant that it was in his best interest to disposed of the case rather than to continue with the trial, because, if he were convicted, petitioner faced a possible jail term (Cutler: A. 369-70). While defendant was unhappy about the prospect of admitting his guilt, he seemed to understand all the options (Cutler: A. 370, 394).[5]

---

[5] Mr. Cutler testified that defendant appeared upset when he entered his plea (Cutler: A. 393). The court found that defendant was not in a state of anxiety when he pled guilty (A. 397).

Once defendant decided to plead guilty, his main concern was to pay as little restitution as possible. (Cutler: A. 378-79).

### The Order and Findings of the Court

In a decision dated July 19, 1982, the court denied defendant's motion to withdraw his plea. (B. 75).

The court found that Mr. Cutler was an experienced criminal attorney who had effectively represented petitioner over the three-year course of the proceedings (B. 70, 74). Mr. Cutler had appeared in court on this matter over thirty times. He had made discovery motions, and, at defendant's request, had moved to dismiss the indictment in the interest of justice and on the ground that defendant had been denied his right to a speedy trial (B. 70). Moreover, prior to the plea Mr. Cutler had participated in nearly two weeks of the trial which involved over 500 exhibits (B. 71).

During the first weeks of the trial, defendant became increasingly apprehensive and nervous as the trial progressed (B. 71). When Landau pled guilty, Mr. Cutler advised defendant that it was in his best interest to do the same (B. 71).

On May 12, 1981 defendant did plead guilty (B. 71). At that time the court advised defendant of all his constitutional rights, and defendant acknowledged that he understood them (B. 72-3). Defendant admitted his guilt (B. 71-2). At no time did defendant claim innocence, nor did he ever indicate that Mr. Cutler had forced him to take the plea (B. 71). Indeed, defendant, who is an intelligent businessman, understood all of his options and knew just what he was doing when he pled guilty (B. 74).

The court found that defendant had unequivocally asserted that he would pay $200,000 restitution (B. 74).

There was no change of circumstances which would keep him from meeting that obligation (B. 74).

## The Sentence

Defendant was sentenced on October 25, 1982, to five years probation and to make restitution of $200,000 plus $2,400 to be paid to the office of the District Attorney for expenses incurred during trial before defendant pled guilty (A. 414-415). Defendant was ordered to pay an initial $40,000 on the date of sentence, plus $40,000 every three months beginning January 15, 1983 (B. 63).

## The State Appeal

In his brief to the New York State Supreme Court Appellate Division, Second Department and in his letter requesting leave to appeal to the New York Court of Appeals defendant raised two issues: That he was denied his state statutory speedy trial rights, and that the court should have permitted him to withdraw his plea of guilty. In support of the latter claim, he never cited the United States Constitution. He cited only two federal cases, *North Carolina v. Alford*, 400 U.S. 25 (1970), and *Hunter v. Fogg*, 470 F. Supp. 1041 (S.D.N.Y. 1979). In this petition for certiorari he raises for the first time the claims that he was denied effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution, and that the plea was involuntary in violation of the Fifth Amendment to the United States Constitution. He also claims that he was denied a speedy trial in violation of the Sixth Amendment to the United States Constitution.

## Reasons Why The Writ Should Be Denied

### 1. Defendant Never Properly Presented His Federal Claims to the State Courts.

Defendant never asserted in any state court that he was denied his Sixth Amendment right to effective assistance of counsel, or that his plea was unconstitutionally coerced or involuntary. Instead he claimed only that the trial court committed error in denying his motion to withdraw his plea. That claim did not alert the state courts to any federal constitutional claim. Defendant framed his speedy trial claim in federal constitutional as well as state statutory terms in the trial court, but abandoned the federal claim in his state court appeal. Having failed to present these federal claims to the state courts, there was never a state court adjudication of them. Thus, this Court's jurisdiction to correct a state court judgment that incorrectly adjudicated federal rights has not been properly invoked. *Webb v. Webb*, 451 U.S. 493 (1981); *Ellis v. Dixon*, 439 U.S. 458 (1955); *Whitney v. California*, 274 U.S. 357 (1928).

It is essential to the jurisdiction of the Supreme Court under 28 U.S.C. § 1257 that a substantial federal question has been properly raised in the state court proceedings. In determining whether a question was "specifically set upon or claimed" within the meaning of U.S.C. § 1257(3), it is relevant and usually sufficient to ask whether defendant satisfied the state rules governing presentation of issues. *Beck v. Washington*, 369 U.S. 541, 549-554 (1962). In New York, a post conviction claim of ineffective assistance of counsel may be asserted pursuant to New York Criminal Procedure Law § 440.10. *People v. Brown*, 45 N.Y.2d 852, 854, 410 N.Y.S.2d 287, 382 N.E.2d 1149, 1150 (1978). Defendant never made such a claim in the state courts.[6] Further, on appeal to the

[6] Defendant's collateral attack on his guilty plea pursuant to Criminal Procedure Law § 440.10 claimed that the plea was in-

[Footnote continued on following page]

New York State Supreme Court, Appellate Division, Second Department and in his letter requesting leave to appeal to the New York Court of Appeals defendant failed to claim ineffective assistance of counsel.

Similarly, defendant's assertion that his federal constitutional right to a speedy trial was violated was never pursued on appeal. The fact that a federal question was properly raised before the trial court is not sufficient to bring the issue before this Court. The question must also be pursued on appeal, thereby giving the highest state court an opportunity to rule on the federal question. *Beck v. Washington*, 369 U.S. 541, 549-554 (1962). Petitioner failed to properly present his federal speedy trial question to the intermediate or highest state appellate courts and is therefore precluded from doing so at this late date.[7]

---

voluntary in part due to the actions of counsel. While never specifically claiming ineffective assistance of counsel the hearing on the collateral attack necessarily presented the court with all the testimony relevant to such a claim. The court obviously found petitioner's testimony incredible as it denied petitioner's application to withdraw the plea.

In any event, the record clearly demonstrates that counsel, an experienced trial attorney, appeared in court over 30 times. Counsel filed all appropriate discovery motions and two motions to dismiss the indictment. Defendant and counsel communicated frequently about the case and complete advice was given on the benefits and detriments of pleading guilty. Nothing in the record indicates that counsel supplied any misinformation to petitioner.

The prosecution's initial plea offer included 90 days incarceration and $400,000 restitution. Defendant's sentence on the plea was probation and $200,000 restitution. Considering the potential liability of four years incarceration and the strong evidence of guilt it can hardly be said that the actions of counsel rendered an unjust result. *See Strickland v. Washington*, — U.S. — (1983).

[7] On appeal defendant made a bare allegation of a state statutory speedy trial claim and in no way alerted the court to his federal claim. *See Daye v. Attorney General*, 696 F.2d 186 (2d Cir. 1982).

## 2. Neither Defendant's Claim Of Innocence Nor His Challenge To The Voluntariness Of His Guilty Plea Raises A Substantial Federal Question.

Defendant treats the petition to this Court as though it were simply another appeal to a court with plenary jurisdiction over all issues raised below. It is well settled that a guilty plea may not be sustained if involuntarily rendered, *Brady v. United States*, 397 U.S. 742 (1970), the result of promises not kept, *Santobello v. New York*, 404 U.S. 257 (1971), or not knowingly and intelligently made, *Boykin v. Alabama*, 395 U.S. 238 (1969), *North Carolina v. Alford*, 400 U.S. 25 (1970). Defendant litigated these issues below and simply seeks to relitigate them before this Court.

When defendant sought to withdraw his guilty plea the trial court provided him with a full evidentiary hearing on his claim, thus affording him full due process. *Blackledge v. Allison*, 431 U.S. 63 (1977); *Machibroda v. United States*, 368 U.S. 487 (1962). The record amply supports the trial court's finding that he was an intelligent businessman who was adequately represented by a knowledgeable and experienced attorney. Defendant knowingly waived his constitutional rights and pled guilty with full knowledge of the consequences. He was fully aware of the charges against him and without equivocation recited his own culpable conduct to each element of Falsifying Business Records in the First Degree, one of the 124 counts in the indictment. The court found no merit in defendant's claim that he had relied on certain unfulfilled promises regarding the amount and payment schedule of restitution. The standards employed by the court were those enunciated in *People v. Miller*, 42 N.Y.2d 946, 398 N.Y.S.2d 133, 367 N.E. 640 (1977), and guaranteed that the plea represented a "voluntary and intelligent choice among the alternative courses of action open to defendant"

as mandated by federal law. *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Santobello v. New York*, 404 U.S. 257 (1971); *Boykin v. Alabama*, 395 U.S. 238 (1969). The trial court recognized that assertions of innocence are significant in determining whether a plea may be withdrawn, but it found defendant's assertions irrelevant and incredible. Essentially defendant's claim of innocence was based upon a belief that he could not be criminally culpable for actions made on behalf of his co-defendant employer. This legal theory was incorrect. Thus, as a factual matter, defendant did not effectively deny his culpability and there was no reason to permit him to withdraw his plea. *United States v. Barker*, 514 F.2d 208, 220 (D.C. Cir. 1975), *cert. denied*, 421 U.S. 1013 (1975).[8]

Absent a constitutional violation, if the advantages of plea bargaining are to be secured they must be accorded a great measure of finality. *Blackledge v. Allison*, 431 U.S. 63, 72 (1977). Further, this Court has long held that it does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). This petition raises only factual issues, of interest to petitioner only, in well settled areas of the law. The petition points out no constitutional error in the court below. The record demonstrates strong evidence of guilt and raises nothing worthy of this Court's review.

---

[8] It is well settled that even where contemporaneous with a guilty plea a defendant claims innocence, the plea may nonetheless be accepted if there is strong evidence of guilt. *North Carolina v. Alford*, 400 U.S. 25 (1970); *United States ex rel. Dunn v. Casscles*, 494 F.2d 397 (2d Cir. 1974). In the instant case the guilty plea came two weeks and 500 exhibits into the trial. In addition, defendant confessed to each element of the crime at the plea hearing. The record as a whole demonstrates the strong evidence of guilt that was before the court when it accepted the plea.

## CONCLUSION

**For the foregoing reasons, the petition for a writ of certiorari should be denied.**

Dated: Brooklyn, New York
September 17, 1984

Respectfully submitted,

ELIZABETH HOLTZMAN
*District Attorney*
*Kings County*

BARBARA D. UNDERWOOD *
STUART D. RUBIN
*Assistant District Attorneys*
210 Joralemon Street
Brooklyn, New York 11201
(718) 834-5022

* Counsel of Record for Respondent